

In The Supreme Court of ¹
THE UNITED STATES.

OCTOBER TERM, 1898.
NO. 223.

THE FIRST NATIONAL BANK OF GRAND
FORKS, NORTH DAKOTA, ²
PLAINTIFF IN ERROR,

VS.

ALEXANDER ANDERSON,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ³
THE STATE OF NORTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR ON MO-
TION TO DISMISS AND AFFIRM.

This case presents the singular aspect of plain-
tiff in error, (defendant below,) attempting to
avoid liability to defendant in error for the value

4 of certain collateral notes, belonging to defendant
in error, converted by plaintiff in error,—the sole
contention of plaintiff in error in this court being
that it had not, as a national bank, power to con-
vert the notes, because it had not power to act as
agent for defendant in error in a certain proposed
5 sale of the notes by the bank as Anderson's
agent. In other words, conceding as we must,
that the decision of the highest court of North
Dakota was correct, if we regard the plaintiff in
error as a natural person instead of a national
bank, and that there was a conversion of
Anderson's notes by the bank, because the bank,
assuming to act as his agent in the sale of the
6 notes to a third person for him, sold the notes to
itself in violation of its duty as his agent,—the
bank, plaintiff in error, now comes to this court,
seeking to take advantage of its own wrong, by
urging that what would have been wrong for a
private individual to commit was right because
committed by a national bank.

7 ALLEGED FEDERAL QUESTION

IMMATERIAL.

In order for the Supreme Court of the United
States to acquire jurisdiction under § 709, U. S.
R. S., the decision of the Federal question must
appear to have been NECESSARILY INVOLVED in the
determination arrived at in the State Court; (Arm-
strong vs. Treasurer, 16 Peters, 281; Mills vs.

Brown, 16 Peters, 525,) so that the State Court 8
could not have given a judgment without de-
ciding it; (*Parmelee vs. Lawrence*, 11 Wall. 36;
affirming *R. R. Co. vs. Rock*, 4 Wall. 177; *Gill vs.*
Oliver, 11 How. 529; *Millingar vs. Hartupee*, 6
Wall. 258; *Fowler vs. Lamson*, 17 S. Ct. Rep.
112.)

Where the decision is made in the State Court 9
on settled pre-existing rules of general jurispru-
dence, the case cannot be brought here for review.
(*Bank of West Tennessee vs. Citizen's Bank*, 14
Wall. 9; *Palmer vs. Marston*, 14 Wall. 10; *Sevier*
vs. Haskell, 14 Wall. 12; *Delmas vs. Ins. Co.*, 14
Wall. 661; *C. & N. W. Ry. vs. City of Chicago*, 17
S. Ct. Rep. 129.)

In the case at bar, the assignments of error
alleged by plaintiff in error, (folios 65-71 Agreed
Record,) all center at one point, viz: That under
the statutes of the United States relating to na-
tional banks, it was not within the power of
plaintiff in error to become the agent of defendant
in error to sell the seven promissory notes in suit
to a third person, even though the evident object 11
of such sale was to apply the proceeds of this sale
of the collateral paper, first to the payment of the
two thousand (\$2,000.00) dollars loan made by
the bank to Mr. Anderson, (the bank simply collect-
ing its own paper, through this method,) and
second, for the bank to remit Mr. Anderson the

12 balance. The assignments of error also allege
that under such statutes, it was not within the
power of the cashier of a national bank to bind
his bank by contract to assume the duties and
obligations of an agent for the sale of notes and
mortgages to third persons.

We contend that the decisions of the State
13 Courts upon these questions, in the case at bar,
were not necessarily involved in the determination
at which they arrived. Our complaint alleges,
paragraph 4, (folio 3 Agreed Record,) that the
seven notes in suit were deposited by Mr. Ander-
son with the bank as collateral security for the
\$2000,—loan, which had been made to him by the
14 bank. This allegation is admitted, by paragraph
4 of defendant's answer, (folio 6, Agreed Record.)
We further allege in our complaint, (paragraph 6,)
that the defendant below wrongfully converted
the notes to its own use. The evidence fully sub-
stantiates this allegation, as we shall point out
later in this brief.

15 OPINION OF NORTH DAKOTA SUPREME
COURT.

The Supreme Court of the State of North Dakota
holds in its opinion on the fourth appeal (72 N. W.
Rep. 916-921,) as follows: (folios 57-8 Agreed
Record:) "The question of ultra vires has been
already discussed in a previous opinion. See 67
N. W. 821. We have nothing to add on that

point, except that THE QUESTION APPEARS TO US 16
TO BE IMMATERIAL. The plaintiff when he author-
ized a sale by defendant as his agent, did, in con-
templation of law, decline to sell to the agent on
the terms agreed, or any terms; there being no
evidence that he ever assented to the purchase of
the notes by the agent itself. A principal always,
in contemplation of law, is in the attitude of be- 17
ing unwilling to sell to the agent on any terms.
Whether the defendant was authorized by the law
to act as agent for the plaintiff IS THEREFORE OF
NO MOMENT, because, even if we CONCEDE this pro-
position, it still remains true that he has never
agreed to a purchase of the notes by the defend-
ant; and hence it follows that the defendant's 18
assumption of ownership of them, as though
plaintiff had assented to a purchase of them by
defendant, constituted a conversion thereof.
* * * What we said in our opinion on the third
appeal on the subject of the authority of the cash-
ier to bind the defendant by creating the relation
of principal and agent between plaintiff and
defendant is still applicable to the case on the 19
record now before us. IN ITS ANSWER AND THE
BRIEF OF ITS COUNSEL the defendant admits that
the writing of the letters referred to was ITS act,
and not the act of an unauthorized agent. By ITS
OWN PLEADING AND ADMISSION it has precluded
itself from raising the point that the cashier had

20 no power to bind it by agreeing that the bank would act as agent for the plaintiff."

It readily and manifestly appears, therefore, that the judgment of the State Court was not based upon the decision of either of the two propositions relied upon by plaintiff in error in its assignments of error. The decision of no Federal
21 question was necessarily involved in the judgment at which the State Court arrived.

The case was disposed of on general principles of law. The notes in suit had been left with the defendant bank as collateral security. The bank, without leave of plaintiff, entered them up in its "Bills Receivable" register, as its own property,
22 on October 7th, 1891, (folio 22,) and has exercised acts of ownership over them ever since, having collected five of the notes as its own property. (Folio 33.) This certainly constituted a conversion of the paper, and rendered it liable to Mr. Anderson for the value thereof. Whether the correspondence between the parties did or did not create the relation of principal and agent between
23 them, whether the bank did or did not have power to act as Mr. Anderson's agent, and whether the cashier did or did not have power to bind his bank by contract to assume such agency,—the fact still remains that the bank did convert the collateral notes in suit, by entering them up as its own, and by collecting them as its own, and upon this conver-

sion the judgment of the court below was based, 24
irrespective of the question of *ULTRA VIRES*.

Under § 709, U. S. R. S., in a case of this nature, it
is only where the decision of the State Court is
AGAINST the immunity claimed that the judgment
“may be re-examined and reversed or affirmed in
the Supreme Court upon writ of error.” There-
fore, in the case at bar, where our State Supreme 25
Court deemed the question of *ULTRA VIRES* “imma-
terial” and “of no moment,” and that Court ex-
pressly conceded the position of plaintiff in error
for the sake of the argument, (folios 57-8 Agreed
Record,)—and still arrived at the same decision in
the case, it follows that the case at bar does not
come within the terms of § 709, U. S. R. S., which 26
contemplates the decision of the State Court to be
AGAINST the immunity set up by the party. Its
status is precisely the same as though the Federal
question had been determined in favor of, instead
of *AGAINST*, the plaintiff in error,—in which case
the judgment of the State Court cannot be re-ex-
amined on writ of error.

27
The settled policy of the United States Supreme
Court appears to have been to take cognizance of
such cases only where the decision of the Federal
question appears to have been *NECESSARILY IN-*
INVOLVED in the determination arrived at in the
State Court.

To say that the question of *ultra vires* was

28 necessarily involved in the decision of the case at
bar, when our State Court deemed it "immaterial"
and "of no moment," is certainly a solecism. The
Court decided the case on other points of law, as
well, involving no Federal question, and its deci-
sion on such other points is necessarily final, where
it conceded the position of plaintiff in error on the
29 only Federal question involved, as it did, for the
sake of the argument. It follows that the writ of
error should be dismissed and the judgment below
affirmed.

II.

QUESTION MANIFESTLY DECIDED RIGHT.

On a motion of this nature, when the case has
30 manifestly been decided right in the Court below,
the writ of error should be dismissed and the
judgment below affirmed, and the case ought not
to be held for further argument. (Arrowsmith vs.
Harmoning, 118 U. S. 194; Church vs. Kelsey,
121 U. S., 282.)

31 AGENCY ADMITTED IN BOTH PLEADINGS OF PLAINTIFF IN ERROR.

Bearing in mind that the only question sought
to be brought before this Court by plaintiff in
error is the question of agency, let us examine its
pleadings in this case upon that point. In those
pleadings, its attorney of record represents the
bank, as a corporation, not any particular officer

of the bank. The answer of the defendant is its 32
answer as a corporation; and the solemn admis-
sions of record of the attorney, in defendant's
answer, are the admissions of the bank itself.
Having pleaded its agency for Mr. Anderson, or
facts from which an agency is irresistibly inferred,
it cannot deny such agency. In this connection
we refer to paragraph VI of the amended answer 33
of plaintiff in error. (See folios 6 and 7, Agreed
Record.) In its pleading, it admits that it charged
Mr. Anderson \$35.00 as a "commission for selling
the paper." This idea of a COMMISSION charged is
inseparable from the idea of an agency.

What does the word "commission" mean? Web-
ster defines it as "a brokerage or allowance made
to a factor or agent for transacting business for 34
another."

Not only in its amended answer, but in its orig-
inal answer, defendant, (now plaintiff in error,)
pleaded its own agency for Mr. Anderson. This
appears affirmatively in the present Agreed Record
(folio 53,) wherein our Supreme Court reviews the
case as follows:—"In the original complaint the 35
question of agency was involved as the very basis
of the action. * * * THE DEFENDANT ADMITTED
THE AGENCY. * * * So far as the question of
agency is concerned, the complaint stands un-
changed." The fact that the original answer has
been amended cannot change the effect of the
estoppel created by this admission of record of

- 36 plaintiff in error in its pleading. An admission of a party, even in a superseded pleading, still has its binding effect. (Gale vs. Shillock, 29 N. W. Rep. (Dak.) 661; Carr vs. Huffman, (Kan. App.) 41 Pac. Rep. 982; Bank vs. Gilman, (S. Dak.) 52 N. W. Rep. 869-871; Myrick vs. Bill, (Dak.) 17 N. W. Rep. 268.) Under the statutes of North Dakota,
- 37 it is not necessary to introduce the superseded pleading in evidence, for our courts must take judicial notice of all prior proceedings in the case pending; (see N. Dak. Session Laws of 1897, chapter 65, § 1, Subd. 13,) and this is the common law rule even in the absence of statute. (12 Am. and Eng. Ency. of Law, 184.)

38 THIS AGENCY MANIFESTLY NOT ULTRA
VIRES.

- Under § 5136 U. S. R. S., a national bank may exercise (not only by its board of directors, but also by its AUTHORIZED OFFICERS OR AGENTS) "all such INCIDENTAL POWERS as shall be necessary to
- 39 carry on the business of banking," by loaning money, etc., and by negotiating promissory notes, etc.

Under this section, it must be conceded that plaintiff in error had power to collect the money owing to it on the \$2000.00 loan which it had made to Mr. Anderson. The very purpose of the bank, in taking the \$7000.00 of collateral notes in

the first place, was to secure or enforce payment 40
of the principal \$2000.00 note, if required, in
order to obtain the money due on its loan made to
Mr. Anderson.

This transaction was directly in the line of the
banking business, and is certainly one of the inci-
dental powers of a bank, reasonably and neces-
sarily so, in order to do business at all. 41

Plaintiff, as his own note was approaching ma-
turity, authorized defendant to sell the paper to a
third person unknown to him, and to use the pro-
ceeds, first, to pay his own \$2,000.00 note to the
defendant, and next to remit the balance to him.
The defendant was instructed to do this at plain-
tiff's instance. It was acting under plaintiff's 42
instructions. It was his agent for this particular
purpose. Being a corporation, it could only so
act through its officers or agents.

The proposed sale did not contemplate the bank
entering into the GENERAL BUSINESS of agency to
sell notes on commission for one who was not
already a customer of the bank, but this whole 43
transaction was simply an incidental matter to
the collection of the bank's own paper, clearly
appearing under the bank's incidental powers,—
the evident object of the transaction being that
from the proceeds of this proposed sale, Mr.
Anderson could thereby pay his own \$2000.00
note to the bank.

44 But instead of selling the paper to a third person, as authorized, and applying the proceeds as authorized, defendant converted the paper to its own use, by entering it up as its own and collecting it as its own. Plaintiff's telegram of October 5th, 1891, replying to that of October 3rd, 1891, (folio 26, Agreed Record,) which "kept
45 the chain of correspondence up," (folio 27,) being Exhibits "12" and 13," which the Agreed Record, at folio 29, shows were received in evidence, was followed by the defendant bank entering up the notes as its own property in its "Bills Receivable" register October 7th, 1891, (folio 22.) And defendant wrote plaintiff on October 7th, 1891, pretending it had sold the paper to a third
46 person, and charging a commission of \$35.00 for it, as though such sale had actually been made (folios 6-7.)

Must the cashier be authorized by defendant's board of directors to receive the payment of the \$2000.00 loan, before he could legally receive such payment?

47 While it is not our purpose on the argument of this motion to discuss the evidence as to agency as thoroughly as we would on the general merits of the case, we may refer the Court to the letter of plaintiff in error, dated September 14th, 1891, appearing at folios 19-20, Agreed Record, wherein it proposed to "place the paper" for defendant in error, if he would allow "a small commission,"

and wherein it also contemplated selling the paper 48
to some capitalist, and also mentioned that it
would "go to work" for defendant in error. This
letter of Sept. 14th, in connection with the tele-
grams of October 3rd and October 5th and the
letter of October 7th, would appear to leave no
doubt as to the intention of the parties being that
the bank was to act as Anderson's agent in sell- 49
ing the notes in question to a third party.

The reasoning of the Supreme Court of North
Dakota in its opinion on the third appeal (see 67
N. W. Rep. 821-3 referred to in the stipulation at
folio 74 of the Agreed Record,) appears sound,
wherein it decides that "as an incident of the con-
ceded power of the bank to realize on security it 50
held, it had power to act as agent for plaintiff in
effecting a sale thereof," and "To deny to a na-
tional bank large INCIDENTAL POWERS in the
enforcement of such claims, would be seriously to
hamper and cripple them, and this too, without
necessity, and in the face of general principles."

Our state Supreme Court further holds (p. 824,) 51
that "it was within the ordinary powers of the
cashier, as the financial officer of the bank, charged
with the custody and control of its funds, AND THE
COLLECTION OF ITS CLAIMS, to enter into this
arrangement on behalf of the bank, that the bank
should act for plaintiff in the sale of these notes;"
and further, on p. 824;—"Moreover, the DEFEND-

52 ANT has deliberately set up in ITS ANSWER that these letters and telegrams were sent out and received BY THE BANK ITSELF. There is no attempt to claim that the dealings were had with the cashier, and that he was not authorized to enter into them on its behalf. The DEFENDANT, in specific language, avers that whatever was done in the matter was done BY THE BANK ITSELF. By
53 defendant's own amended answer, therefore, the question of the power of the cashier is eliminated from the case."

That part of the decision of the highest Court of North Dakota last referred to does not present a Federal question. It presents simply a question of construing a pleading, upon which the judgment
54 of the highest State Court should be final, and especially as a decision upon code pleading, which prevails in our state.

In the same opinion, p. 822, (THIRD APPEAL) the Court further states:—"The defendant, by its amended answer, NOW FOR THE FIRST TIME asserts that it was not acting as agent, did not intend to
55 act as agent," etc. * * * "At all times up to the period when the defendant's answer was amended, it had CONCEDED THAT IT WAS AGENT, and it defended the case solely on the ground that it had accounted for and paid over to plaintiff all the net proceeds of the sale effected by it AS SUCH AGENT. The agency was, in effect, admitted in

the original answer. It formed the corner stone 56
of defendant's argument in this Court on the first
appeal, and was not questioned by defendant's
counsel in brief or oral argument on the second
appeal. * * * Defendant has estopped itself by
its own solemn admission from raising the
point."

DOCTRINE OF ULTRA VIRES HAS NO AP- 57
PLICATION TO TORTS COMMITTED BY A
CORPORATION.

Our amended complaint is based primarily upon
the conversion of plaintiff's collateral notes by the
defendant bank. Although the tort is waived
(par. 8) for the sole purpose of maintaining this
action as a suit in assumpsit, "the tort itself, so 58
far as it gives rise to a cause of action, is not for-
given." That is the decision of our State Supreme
Court in this case, and as it raises no Federal
question, (being simply a question of construing a
pleading under the code,) such decision is final.
(67 N. W. Rep. 821-4.)

The fact that plaintiff in error, immediately fol- 59
lowing the telegrams, entered up the collateral
notes as its own property, and collected them as
its own, WITHOUT LEAVE OF DEFENDANT IN ERROR,
(his only permission being to sell to a THIRD PER-
SON,) establishes a conversion of the notes by the
bank, without regard to the question of agency at
all. Whether or not this conversion was the con-

60 version set out in the complaint is immaterial,
and this under an express Statute of the State of
North Dakota, being § 5482, of the 1895 Revised
Codes of N. Dak., as follows:—"§ 5482. The
relief granted to the plaintiff, if there is NO ANSWER,
'cannot exceed that which he shall have demanded
in his complaint; but in any other case the Court
61 may grant him relief consistent with the case
made by the complaint and embraced within the
issue."

In such case, our Supreme Court treats the
complaint amended, to conform to the proof.
Ashe vs. Beasley, (N. Dak.) 69 N. W. Rep. 188—
191. To cut off the power to amend to conform
62 to the proof, it is not enough that the cause of
action is different. The claim itself must be
changed, and that, too, in a substantial way."
Anderson vs. Bank, (2nd appeal,) 64 N. W. Rep.
(N. Dak.) 114—117.

This being established, what is the effect of the
doctrine of ultra vires, as applied to torts com-
mitted by a corporation?
63

We cite the following, from the Amer. & Eng.
Ency. of Law, Vol. 27, p. 393:—"It is true that
every tort committed by a corporation involves
an unauthorized exercise of corporate power, but
this is no reason why the corporation should not
be held responsible for the consequences. * * *
Corporations are held liable to the same extent,

and under the same circumstances, for the consequences of their wrongful acts, as natural persons.” 64

And again, p. 394:—It is no defense to an action of tort against a corporation that the tort was committed while transacting a business without and beyond the purview of the corporate authority and purposes, if the corporation in any clear and explicit manner recognized the business as its own, as by employing agents to superintend it, OR RECEIVING THE PROFITS ARISING THEREFROM.” 65

Again, in foot-note, p. 394:—“While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technically ultra vires, it is well established that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case, the doctrine of ultra vires has no application.” *Central R. etc. Co. vs. Smith*, 76 Ala. 582, 52 Am. Rep. 353; *Mer. Nat. Bank vs. State Nat. Bank*, 10 Wall. 604. 66

LAW OF THE CASE.

“The records on a former appeal in the same action may be looked into for the purpose of ascertaining what facts and questions were then before the Court, so as to see to the correct application of this rule that such decision is the law of the case. * * * The facts being found to be the same, the rule applies that a decision of the 67

- 68 Supreme Court in a given case becomes the law of the case in all of its subsequent stages, and will not be reviewed when the case comes up on a second appeal, the facts being the same." (Plymouth County Bank vs. Gilman, (S. Dak.) 52 N. W. Rep. 869-71, and cases cited; Scottish-American Mortg. Co. vs. Reeve, (N. Dak.) 75 N. W. Rep. 8910. The Supreme Court of Wisconsin tersely states the rule as to the binding force of a decision on a former appeal thus:—"Though erroneous, it must stand as the law of this case." (Everett vs. Gores, (Wis.) 66 N. W. Rep. 616.)

And this is only a fair and reasonable rule. In the case at bar, the Supreme Court of North Dakota decided on four separate appeals in this case that the relation between the plaintiff and defendant was that of principal and agent. (Folios 47 and 74, Agreed Record.) Good faith towards defendant in error would have demanded that if plaintiff in error intended to raise the alleged Federal question at all, it should have done so a long time prior to the third or fourth trial of the case, and that inasmuch as it did not then raise the Federal question, that the same has long since been waived.

Plaintiff in error has brought here only the record on the fourth appeal, and although the stipulation at folio 74 of the Agreed Record, includes the consideration by this Court of the

reported decisions of the Supreme Court of North 72
Dakota in the case of Anderson vs. Bank, still
plaintiff in error has not brought here any record
of its objections, showing any Federal question
raised upon any former trial, and especially not
upon the first and second trials. It is elementary
that plaintiff in error, in order to reverse the judg-
ment, has the burden to affirmatively show error; 73
and this it cannot do in the case at bar, without
showing that it expressly claimed the protection
of some "title, right, privilege or immunity
specially set up or claimed" by it under the con-
stitution or statutes of the United States, (C. &
N. W. R. Co. vs. Chicago, 17 Supr. Ct. Rep. 129,) 74
and this, too, before our Supreme Court decision
on the question of agency had become the settled
law of the case on the second trial. That the evi-
dence on the third trial was identical with that of
the second trial, as far as the question of agency
was concerned, is amply proven by the language
of our Supreme Court on the third appeal in
Anderson vs. Bank, 67 N. W. Rep. 822, (referred
to in our stipulation) as follows: "The facts are 75
precisely the same as they were when this case
was before us the last time."

Did plaintiff in error, prior to the third trial,
even attempt to raise the Federal question, which
it now attempts to raise? No! The language of
our State Supreme Court on the third appeal is

76 emphatic on this point, as follows, (67 N. W. Rep. 822:) "The defendant, by its amended answer, now, for the FIRST TIME asserts that it was not acting as agent."

We draw the following conclusion from this rule as to the law of the case, viz: If, on the first or any subsequent appeal, the decision of the
77 North Dakota Supreme Court upon the subject of agency became the law of the case in all its subsequent stages, then the trial judge, on the fourth trial, in deciding that the relation of principal and agent existed between plaintiff and defendant, did not err; because in this case he could only give his decision correctly and without error by follow-
78 ing the law of the case, which, for the purposes of this action, was just as binding upon him as any other law in existence. It follows that since the trial judge did not err on the fourth trial in deciding the relation of the parties to be that of principal and agent, then the State Supreme Court did not err on the fourth appeal in affirming the judgment of the trial judge upon that point; for
79 they could not lawfully reverse his decision, when that decision was in perfect harmony with the law of this case, as it had then become established. Plaintiff in error cannot be heard to say that the trial judge on the fourth trial was following an erroneous law of the case; because, not having sued out a writ of error in this Court upon the

judgment of the Supreme Court of North Dakota 80
upon either the first, second or third appeals, it is
not in a position to attack the validity of those
judgments; and as far as plaintiff in error is con-
cerned, those judgments are absolutely correct and
without error.

We repeat:—Good faith toward defendant in
error would have required plaintiff in error to 81
have litigated the Federal question long before it
attempted so to do, and to have claimed its so-
called protection of the United States Statutes long
before it did.

DAMAGE UNDER RULE 23.

We believe, under the circumstances of this case, 82
we are justified in asking that damages of 10 per
cent. upon the amount of the judgment as men-
tioned in Rule 23 of this court be awarded to de-
fendant in error, as well as costs of this motion.
The original action was commenced more than
five years ago. It has already been passed upon
on four appeals, a new trial having been awarded
plaintiff below on each of the first three appeals. 83
There should certainly be some end to litigation.
When, in order to enforce a right it becomes nec-
essary for a litigant to have four trials, four mo-
tions for new trials, and four appeals in the State
Courts, extending over a period of nearly five
years, and then to be obliged to await the deter-

- 84 mination of a writ of error in the highest tribunal
of our land, in a case involving less than \$2,000.00,
it appears that the right is simply a right in
theory, but not in practice. For the courts of the
State to advise its citizen that he has a right in
theory, but that it cannot enforce it for him, is to
weaken the very foundations of the government.
- 85 The rate of interest in the converted notes was
nine per cent. per annum, while the legal interest
recoverable in this action is but seven per cent.
(See end of fol. 51, Agreed Record.)

The language of the Supreme Court of North
Dakota on the last appeal was explicit in stating
that it would have arrived at the same conclusion
86 at which it did arrive, even had it conceded the
contention of plaintiff in error on the Federal
question sought to be raised. Plaintiff in error
knew of this immateriality before it sued out the
writ of error which brought the case here; but the
case has been brought here, in spite of such imma-
teriality of the Federal question,—apparently for
delay only; and we therefore believe, in view of all
87 the circumstances, that the defendant in error
should be awarded the damages mentioned, as
well as dismissal of the writ of error and an af-
firmance of the judgment below.

On the question of damages of ten per cent. re-
quested in our motion, we cite the following from
the opinion of Mr. CHIEF JUSTICE WAITE, in Whit-

ney vs. Cook, 9 Otto, 607:—"Our experience teaches 88
us that the only way to discourage frequent appeals
and writs of error is by the use of our power to
award damages; and we think this a proper case
in which to say that hereafter, more attention
will be given to the subject, and the rule enforced
both according to its letter and spirit. Parties
should not be subjected to the delay of proceed- 89
ings for review in this Court, without reasonable
cause, and our power to make compensation to
some extent for the loss occasioned by an unwar-
ranted delay ought not to be overlooked."

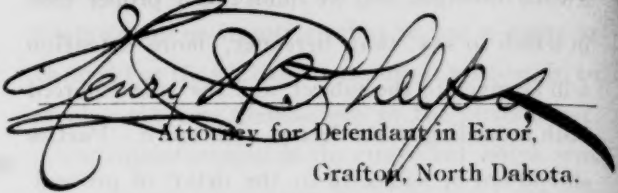
In the case at bar, it became necessary, by
reason of plaintiff in error suing out the writ, for 90
us to either enter appearance personally on behalf
of Mr. Anderson, crossing half the continent for
that purpose, as the writer did in January last, or
else employ assistant counsel at Washington, in-
volving, perhaps as great an expenditure. We
therefore ask allowance of ten per cent. damages,
as mentioned in our motion. 91

As before indicated, we have not, upon this
motion, argued the question of agency as thor-
oughly as we would expect to do, should it be-
come necessary to argue the case on its general
merits. We trust, however, that sufficient ap-
pears from the record to entitle defendant in error

92 to a dismissal of the writ of error and affirmance
of the judgment below,

Respectfully submitted.

November 22nd, 1898.


Attorney for Defendant in Error,
Grafton, North Dakota.